UNITED STATES
v.
JACK McLEAN

IBLA 80-56 Decided October 7, 1980

Appeal from the decision of Administrative Law Judge Dean F. Ratzman, rejecting application to purchase headquarters site and cancelling entry. Contest No. A-057862.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act--Constitutional Law: Due Process--Contests and Protests: Generally

   Due process consists of notice and an opportunity for hearing. Although the contestee in a government contest proceeding under the Administrative Procedure Act has a right to be represented by counsel, due process does not require that the Department of Interior hold a second hearing because appellant did not avail himself of that right at the first hearing.

2. Administrative Procedure: Burden of Proof--Alaska: Headquarters Sites

   In a contest proceeding to challenge a headquarters site entry, the Government has the burden of establishing a prima facie case of noncompliance with the requirements for headquarters sites. The headquarters

> site applicant then has the burden of establishing entitlement to the land by showing compliance with the law. 43 U.S.C. § 687a (1976). Where such an applicant asserts that he has operated a cabin and boat rental business on the site, yet fails to produce sufficient evidence to show that he was engaged in a trade, manufacture or other productive industry from which he reasonably hoped to derive a profit, the application to purchase must be rejected.

APPEARANCES: B. Richard Edwards, Esq., Edwards & Bledsoe, Anchorage, Alaska, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Jack McLean has appealed the decision of Administrative Law Judge Dean F. Ratzman dated September 26, 1979, rejecting his application to purchase a headquarters site located in sec. 23, T. 20 N., R. 6 E., Seward meridian.

Appellant filed a Notice of Location on August 13, 1962, claiming land on the south shore of Bonnie Lake for a cabin and boat rental business. On August 14, 1967, appellant submitted an application to purchase the land as a headquarters site under the Act of March 3, 1927, 43 U.S.C. § 687a (1976). On the application, appellant indicated that he had constructed and maintained a road to adjacent properties, cleared a portion of land and built a cabin which he furnished for rental, constructed an outhouse, installed a floating dock and provided boats for rental.

A Bureau of Land Management (BLM), realty specialist examined appellant's site on February 10, 1977, and July 8, 1977. On the basis of these examinations, he concluded that although the site was suitable for a cabin and boat rental business and the improvements on the site were sufficient to fulfill the requirements for purchase of a headquarter's site, there was insufficient evidence of commercial activity to support the application. He recommended that BLM initiate a contest directed at cancelling appellant's entry unless appellant could come forth with evidence that the site was actually occupied and used in good faith as a business.

On August 24, 1978, BLM issued a contest complaint charging:

> Section 10 of the act of May 14, 1898 (30 Stat. 413), as amended by the act of March 3, 1927 (44 Stat. 1364; 43 U.S.C. 687a), as amended, and the regulations issued thereunder, specifically Title 43, Code of Federal Regulations, 2563.0-3 and 2563.1-1(a)(2), require that the land be actually used and occupied as a homestead or headquarters site in connection with contestee's own business or

> that of his employer. The actual use by the contestee was not primarily as a headquarters site in connection with trade, manufacture, or other productive industry. The contestee is not using the headquarters site for a business or in connection with a business.

Appellant denied these charges.

A hearing was held before Judge Ratzman on August 1, 1979. BLM presented one witness, the realty specialist. Appellant was not represented by counsel at the hearing, and he was the only witness for contestee.

[1] Before turning to the substance of this appeal, we must address another matter. In his notice of appeal, appellant requests that this Board permit a second hearing on all issues of fact because he did not have the assistance of counsel in preparing his response to the government's contest of his headquarters site application and was not represented by counsel at the hearing before Judge Ratzman. Appellant suggests that unless another hearing is held the result in this case will not be fair because the outcome will not rest on the appropriate factual ground. We must disagree and deny the request for a hearing.

We have examined this issue before. Although a contestee in a government contest proceeding under the Administrative Procedure Act has a right to be represented by counsel, the Department of the Interior has no duty under that Act or the Constitution to provide such counsel for him. United States v. Gayanich, 36 IBLA 111, 117 (1978); Eldon Brinkerhoff, 24 IBLA 324, 81 I.D. 185 (1976). Nor does the Department have any obligation to provide a second hearing when appellant did not avail himself of his rights at the first. Due process consists of proper notice and an opportunity for a hearing and it suffices if the claimant is afforded the opportunity to be present and heard. United States v. Bellamy, 25 IBLA 50, 52 (1976); United States v. Ragsdale, 20 IBLA 348 (1975). Appellant had more than adequate notice of the hearing in this matter. If appellant was having difficulty obtaining counsel and preparing his case, he could have requested a postponement of the hearing on a showing of good cause and proper diligence. 43 CFR 4.452-3 and 4.472(b). The fact that appellant had no attorney at the hearing affords him no greater rights on appeal than if he had had an attorney. Eldon Brinkerhoff, supra at 331. Judge Ratzman carefully advised appellant on his rights to object to evidence, to testify, and otherwise conducted the hearing in a manner which afforded appellant every opportunity to present his case. We will not order a second hearing where appellant was given notice and an opportunity for a hearing, where he actually was present at the hearing and where nothing has been submitted which suggests

that another hearing would produce a different result. 1/ United States v. Syndbad, 42 IBLA 313 (1979).

Appellant has also requested oral argument before the Board. We find that no useful purpose would be served by oral argument in this case since appellant has submitted an extensive brief in support of his appeal, and that request is accordingly denied.

Appellant argues briefly that the Government is barred by the doctrine of estoppel and laches under 5 U.S.C. § 555 (1976), but his arguments are not supported by the facts. It was incumbent upon appellant to compile his proof at the time of submission of his application to purchase, and to retain the proof until the proceedings are completed.

Turning to the substance of this appeal, appellant asserts, in his statement of reasons, that his due process rights have been violated for another reason. He argues that:

> The United States did not present any prima facie case in support of their contest. At the hearings, the United States merely commented on the application of McLean. No evidence was produced at the hearings upon which the Administrative Law Judge could conclude that the United States had met the burden of proof required of BLM to sustain the contest. It is clear that BLM did not have to file a contest in this proceeding unless McLean, by his sworn statements and support included with his application for a Headquarters Site, had made a prima facie case that he should be issued a patent to the Headquarters Site. Otherwise, there would be no reason for BLM to file a contest. BLM could have simply rejected the application for failure to meet the legal requirements. Moreover, the filing of the contest appropriately recognized the adverse interest of McLean in the Headquarter Site, which could only be obtained by his meeting this prima facie requirement.

1/ Appellant has attached an affidavit to his statement of reasons which makes various assertions as to his use and occupancy of the headquarters site. We have held consistently that new evidence, when submitted for the first time on appeal, may not be considered or relied on in making a final decision, but may only be considered to determine if there should be a further hearing. Joe I. Sanchez, 42 IBLA 176 (1979); United States v. Maley, 29 IBLA 201 (1977). After review of the affidavit we do not believe that appellant's assertions therein suggest that a second hearing would produce a different result. United States v. Long, 43 IBLA 150 (1979).

Appellant also contends that the results of the BLM field examinations are not relevant evidence. In summary, appellant seems to argue that BLM did not sustain its charges because it did little more than introduce the documents submitted by appellant to support his application.

[2] We have reviewed the record in this case and have concluded that Judge Ratzman's summary of the facts is accurate and that his analysis and determination are legally correct. Accordingly, we adopt his decision and attach it hereto.

Appellant's arguments on appeal are unavailing. As Judge Ratzman indicated the burden of showing entitlement to the land claimed as a headquarters site rests with the applicant. The applicant must establish that he has fulfilled the requirements of the laws and regulations. United States v. Wilson, 38 IBLA 305 (1978). When an application on its face indicates that the applicant has a valid claim, but independent evidence, i.e., a field examination, conflicts with the statements on the application or suggests that the requirements of law have not been met, BLM properly brings a contest to present its conflicting evidence and give the applicant an opportunity to rebut that evidence and support his claim with probative evidence that the law has been satisfied. John B. Coghill, 29 IBLA 177 (1977); Frederick P. Dunder, 17 IBLA 101 (1974); Done E. Jonz, 5 IBLA 204 (1972). Here, the field examiner's report, even though filed approximately 10 years after appellant's application to purchase, cast sufficient doubt on the contention that appellant had established a commercial operation to warrant a contest. 2/

At the contest hearing, BLM has the burden of going forward with the evidence, not the burden of proof. BLM need only make a prima facie showing of nonfulfillment of the requirements to put appellant to his burden of persuasion. BLM was not obligated to prove that appellant had not met the legal requirements, rather, it was up to appellant to prove that he had. We agree with Judge Ratzman that the record as a whole does not support a finding that a productive business had been established.

2/ Even appellant has recognized this point. Footnote 2 to his statement of reasons begins: "Indeed, the field examiners' report of activities in 1977 or 1979 could be a basis upon which to bring a contest proceeding." Appellant's misconception as to the burden of persuasion is well illustrated by the remainder of that footnote:

"The field examiner's report, in other words, is sufficient for BLM to raise suspicions that relevant evidence may exist during the five year period prior to August 12, 1967 that would be adequate to rebut the prima facie case of McLean. This suspicion, however, certainly is not adequate to relieve BLM's requirement to further investigate, seek out, and produce the relevant evidence from the appropriate time period."

BLM need only raise a prima facie case itself against appellant's application to put appellant to his proof.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Edward W. Stuebing
Administrative Judge

September 26, 1979

United States of America,	:	Contest No. A-057862
	:	
Contestant	:	Headquarters Site
	:	
v.	:	
	:	
Jack McLean, :		
	:	
Contestee	:	

DECISION

Appearances: Robert Charles Babson, Esq.,
Office of the Solicitor,
U.S. Dept. of the Interior,
For the Contestant.

Jack McLean,
In Propria Persona, Contestee.

Before: Administrative Law Judge Ratzman

The Alaska State Office, Bureau of Land Management, Department of the Interior, issued a Complaint on August 24, 1978, alleging that Jack McLean's Alaska headquarters site entry is invalid for the following reasons:

> Section 10 of the Act of May 14, 1898 (30 Stat. 413), as amended by the act of March 3, 1927 (44 Stat. 1364; 43 U.S.C. 687a), as amended, and the regulations issued thereunder, specifically Title 43, Code of Federal Regulations, 2563.0-3 and 2563.1-1(a)(2), require that the land be actually used and occupied as a homestead or headquarters site in connection

> with contestee's own business or that of his employer. The actual use by the contestee was not primarily as a headquarters site in connection with contestee's own business or that of his employer. The actual use by the contestee was not primarily as a headquarters site in connection with trade, manufacture, or other productive industry. The contestee is not using the headquarters site for a business or in connection with a business.

An Answer denying the foregoing allegations was filed by the contestee on September 25, 1978. A hearing was held on August 1, 1979 in Anchorage, Alaska. A Notice of Location for the lands in dispute, filed on August 13, 1962, claimed use for a cabin and boat rental business. On August 14, 1967, the contestee filed an Application to Purchase Headquarters Site. The 2.87 acre lot is located in Matanuska Borough, on the south shoreline of Bonnie Lake, which is 1.2 miles due north of the Glenn Highway at milepost 83.5.

John D. Bowman, a Realty Specialist with the BLM, has had 10 years experience in examining public lands for compliance with homestead and other statutes under which entries have been made. Tr. 4. He examined the headquarters site on February 10, 1977 and July 8, 1977. Tr. 22. On the first examination the ground was covered with snow and the cabin there was locked up. He found a metal boat with a trailer on the site. He did not see a boat dock. Walls that he could see in one room of the cabin were unfinished. Tr. 24. No plumbing or commercial utility power was brought to the cabin. Mr. Bowman inspected an access road to the site during his July examination. A gate on this road was locked and a no trespass sign was posted. A "for rent" sign for the cabin was also there. He found no boat docks or any activity relating to an ongoing business during his second inspection. Tr. 25.

The site is situated in a recreation area with lake frontage. Tr. 26. The improvements on the site would meet the headquarters site law requirements. However, since Mr. Bowman found little evidence of commercial activity in the form of boat docks, signs or advertising, he concluded the use of the site was recreational rather than commercial. Several unseaworthy wooden boats were found near one edge of the headquarters site. Tr. 26. A State park is adjacent to the site which has signs identifying the park and providing information relating to fishing. Tr. 27.

Included with documents transmitted by Mr. McLean was a receipt for a total of $36 from Mr. Steinborn for rent of the facilities for two days in July, 1967. Tr. 28. There were no other receipts showing rental of the headquarters site. After examining the land and reviewing Mr. McLean's case file, Mr. Bowman recommended a contest action be brought to declare the headquarters site invalid. Tr. 29.

On July 19, 1979, Mr. Bowman made another inspection of the headquarters site. He took several photos of the area. Ex. 13. He also made a brief examination shortly after Thanksgiving in 1977. Tr. 36. Nothing new was found on those occasions. Tr. 37.

Mr. McLean said that he has been a victim of vandalism and theft that had damaged his boats and decking which he had installed on pontoons for a dock. Tr. 38. He explained that he had expanded the size of his cabin and that the unfinished room viewed by Mr. Bowman was part of the new addition. His usual method of advertising is by customer referrals. Tr. 40.

A letter from Mr. McLean addressed to the BLM office in Anchorage, dated March 16, 1965, stated that Mr. McLean had not perfected his headquarters site claim but substantial progress had been made. Ex. 3. A photo was attached which showed a cleared area which Mr. McLean contends is an access road to the site. The 1967 Application to Purchase (Ex. 4) listed the following improvements:

> Constructed and maintained road to adjacent property holders. Cleared area for cabin site and constructed 12' x 16' cabin. Installed wiring, fiberglass insulation, wall to wall carpeting and the necessary furnishings to be rented furnished. Have constructed outhouse the required distance from cabin and installed floating dock with boats available for rental.

A copy of a newspaper ad from the Anchorage Daily Times, dated May 31, 1967, indicates that the McLean cabin was for rent at that time. Ex. 5. Also submitted was a copy of an Alaska Business License dated July 3, 1967, issued to the

Pauljackbe Rental Corp. for a cabin and boat rental operation. Pauline McLean applied for the license. Costs incurred on the site exclusive of labor and rental equipment were said to have been $1200 as of July, 1967.

An undated letter from James A. Link, president of Bryant Electric, Inc., received by the BLM Anchorage Office on August 14, 1967, stated that Mr. Link had performed electrical work on the cabin near Bonnie Lake. Ex. 8. Mr. Gustav Steinborn advised in a letter dated August 14, 1967, that he rented the facilities at the McLean site during the week of July 17, 1967. Ex. 9. A copy of a receipt, dated July 18, 1967, from Gustav Steinborn for the rent of a boat ($12.00) was placed into evidence. Another receipt from Mr. Steinborn bearing the same date for rental of a cabin ($24.00 for two days rent) was submitted.

Mr. Roy L. Biffle, of Palmer, Alaska, submitted a letter, dated October 24, 1978, vouching for Mr. McLean's efforts in developing a boat and cabin rental business on the headquarters site. Ex. 13. A letter from Ivan M. Gilliam, supports Mr. McLean's effort to acquire the site. The letter asserts that several persons have rented the cabin and boats. However, the letter also referred to the prospective boat and cabin rental facility that will be developed. Affidavits from John G. Gates, Ray Moers, William J. Thomas, Roy A. Wyne and William D. Crowl certify they have rented the cabin and facilities at Bonnie Lake from Mr. McLean several times. No dates or rental amounts were disclosed in these affidavits. Ex. 12.

A BLM Field Report prepared by John Bowman, dated October 17, 1977, concerning the McLean Headquarters Site recommended that the application for purchase be rejected. After two land examinations in 1977, the following improvements were found:

> One cabin (plywood construction) 16' x 24' painted red. Two rooms, unfinished inside, partially wired, no plumbing, no commercial power, one door, three windows, four foot overhang front porch with roll roofing on roof, one outside toilet, 4' x 4'.
>
> Personal property observed on the site: one boat, aluminum, 14' one trailer, boat (for above boat).

The report went on to conclude that the land is well suited for use as a headquarters site in conjunction with a cabin and boat rental business. Airplane or automobile access is available to the lake area where good trout fishing exists. Although the facilities have been used, Mr. Bowman concluded that the use was not in conjunction with a commercial venture. The evidence indicating there was any business on the site was limited to only two months in 1967. There was no evidence of business prior to that time. The receipts were nominal, only $36. Ex. 13.

Analysis and Determination

The burden of establishing entitlement to the land claimed as a headquarters site rests with the applicant and he must show compliance with the statute and regulations. United States v. Charles Thomas Beaird, 31 IBLA 203 (1977); United States v. Robert B. Tippetts, 29 IBLA 348 (1977). In a contest hearing on a headquarters site claim, evidence must be submitted from which it can be concluded that applicant was engaged in an actual business operation from which he reasonably hoped to derive a profit. United States v. Maurice L. Wilson, 38 IBLA 305 (1978); United States v. Beaird, supra. The receipt of a few dollars over a period of years does not satisfy these criteria. See United States v. Jerry L. Crow, 28 IBLA 345, 349 (1977). To establish a right to land under the public land laws, an applicant is required to support his assertions with evidence which is within his sole control. United States v. Beaird, supra; United States v. Crow, supra; United States v. Block, 12 IBLA 393, 80 I.D. 571 (1973).

A headquarters site application is properly rejected where the applicant fails to produce any probative evidence that the land claimed as a headquarters site was used in connection with a productive industry. Gustav O. Wiegnar, 26 IBLA 123 (1976); United States v. Beaird, supra.

The evidence submitted by the Government establishes that meager rental use has been made of the McLean entry, and nominal revenues have been collected. Although the contestee has constructed a cabin and access road on the headquarters site, and has had one or more boats and associated facilities, he has failed to present sufficient proof to qualify for a patent. The only receipts in the record reveal a total of $36 paid during the prove-up period. Such nominal receipts are not sufficient to support a headquarters site claim. See Lee S. Gardner, A-30586

(1966), where the Secretary rejected a headquarters site application for a boat rental service which, coincidentally, collected only $36 in gross receipts during the prove-up period. In John V. Voight, 17 IBLA 87 (1974), evidence of receipts for a cabin rental operation totaling only $210 over a month long period in a single year was found to be insufficient to sustain an application to purchase.

The affidavits submitted by professed users of Mr. McLean's facilities fail to indicate when and for what duration the uses were made. Significantly, the affidavits indicate use during the last several years. The date of the affidavits were from September to October 1978. The date of expiration of the prove-up period was October 23, 1967. Thus the uses referred to in the affidavits took place years after the end of the prove-up period. Evidence of any use after the prove-up period may not be considered. See United States v. Tippetts, supra at 353.

Contentions raised by the contestee relating to the contestant's delay in commencing a proceeding to cancel the headquarters site application cannot affect the outcome of this contest. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescences of its officers or agents, or by their failure to act or delay in the performance of their duties. United States v. Maurice L. Wilson, 38 IBLA 305 (1978).

The contestant has sustained the charges set forth in the Complaint. Accordingly, the application to purchase the headquarters site is rejected, and the entry is cancelled.

Dean F. Ratzman
Administrative Law Judge

Appeal Information

An appeal from this decision may be taken to the Board of Land Appeals, Office of the Secretary, in accordance with the regulations in 43 CFR Part 4 (revised as of October, 1978). Special rules applicable to public land hearings and appeals are contained in Subpart E. If an appeal is taken,

the notice of appeal must be filed in this office (not with the Board) in order to facilitate transmittal of the case file to the Board. If the procedures set forth in the regulations are not followed, an appeal is subject to dismissal. The adverse party to be served with a copy of the notice of appeal and other documents is the attorney for the United States Department of the Interior whose name and address appear below.

Enclosure: Additional information concerning appeals.

Distribution:
Regional Solicitor, U.S. Dept. of the Interior, 510 L Street, Suite 408, Anchorage, Alaska 99501 (Cert.)
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